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In the Supreme Court of the United States

OCTOBER TERM, 1959

CAPITOL AIRWAYS, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at 271 F. 2d 752. The opinion of the Civil Aeronautics Board (J.A. 1313a)[1] has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1959, and a petition for rehearing was denied on December 15, 1959. By order of January 14,

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[1] References to the Joint Appendix printed in the court below are designated "J.A. ——".

1960. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to March 14, 1960. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board, having determined in a comparative proceeding that one applicant has superior qualifications, must make further findings as to the individual qualifications of the losing applicant and the public need for its proposed type of service.

2. Whether the Board's established procedure for accepting oral or written statements by Congressmen or other public officials in certificate proceedings deprived petitioner of a fair hearing on its application.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, and the Administrative Procedure Act, § 8(b) 5 U.S.C. 1007(b), are set out in the appendix to the petition (pp. 15a-16a).

STATEMENT

Petitioner, a non-scheduled air carrier, was an unsuccessful applicant for Chicago-Miami and Detroit-Miami air routes in the Civil Aeronautics Board's *Great Lakes-Southeast Service Case*. After hearing and full administrative proceedings, the Board, by decision of September 30, 1958 (J.A. 1313a), concluded that only one additional carrier should be certified over each of these routes and, as between the competing applicants, awarded certificates to Northwest Airlines for the Chicago-Miami route and to Delta Airlines for

the Detroit-Miami route. The Court of Appeals for the Second Circuit affirmed (Pet. App. 1a-14a).

In his Initial Decision, the examiner made detailed findings with respect to the qualifications and proposals of the several applicants (J.A. 621a-768a), including the petitioner, Capitol Airways (J.A. 654a-665a, 668a). On the basis of these and other findings, he concluded that only one additional Chicago-Miami service was required (J.A. 879a-891a); that the need was for both coach and regular-fare service; that Capitol had proposed only coach service; that its experience as a scheduled operator was slight; that the type of equipment it proposed was unlikely to provide effective competition to Delta and Eastern, who already operated on the routes; and that Capitol had not secured firm commitments for financing any extensive Chicago-Florida operation (J.A. 908a-909a). Due account was taken of petitioner's proposal to provide coach service at fares lower than those already existing on the route, but the examiner concluded "upon a review of all of the factors relating to the comparative public interest that other applicants are in a superior situation to conduct the service" (J.A. 909a). Similar conclusions were reached with respect to the Detroit-Miami route (J.A. 919a).

The Board, adopting the relevant findings and conclusions of the examiner as its own (J.A. 1320a), concluded that Northwest's qualifications for the Chicago-Miami operation and Delta's for the Detroit-Miami route were superior to Capitol's. It noted the need for both first class and coach service on these routes, the economic strength and operating experience of the successful applicants, and their superior ability to place larger and newer types of aircraft into opera-

tion. The Board added, "We have even considered an experimental authorization of Capitol's service, in addition to the other new services we are authorizing, but we are unable to find that the advantages of such an experiment outweigh the competitive impact on the other new services we are authorizing" (J.A. 1331a).

At the oral argument before the Board, various Congressmen (or persons speaking on their behalf) were allowed to appear and present arguments as to the needs and interests of their localities in obtaining new air service.[2] Congressmen from areas to the northwest of Chicago supported Northwest's certification for the Chicago-Miami route on the ground that Northwest, by combining the new routes with those it already served, would be able to provide new service from the areas northwest of Chicago to southeastern points.

Petitioner appealed on the same grounds it raises here: (1) that the Board erred in failing to make specific findings as to petitioner's individual fitness or the public need for the particular service it proposed, and (2) that the Board erred in permitting the appearance of the Congressmen at oral argument. The Court of Appeals rejected both contentions (Pet. App. 12a-13a).[3]

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[2] In addition, a number of written statements by Congressmen were received in lieu of oral argument.

[3] A separate petition for a writ of certiorari to review the judgment in the instant case has been filed by Eastern Air Lines, No. 785, this Term. The instant petition, however, presents no issues raised by Eastern; in fact Eastern's appeal was considered by the court below (see Pet. App. 4a-11a) separately from that of Capitol (Pet. App. 12a-13a).

ARGUMENT

1. Petitioner contends that the Board's failure to determine whether Capitol was "fit, willing, and able" to provide the service it had applied for, or whether the low-cost coach service it proposed would serve the public convenience and necessity, violated the requirements of §§ 401(d) and 1005(f) of the Civil Aeronautics Act, 49 U.S.C., 1952 ed., 481(d) and 645(f),[4] and § 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b). However, it misconceives the statutory requirements and the basis of the Board's action. As the Statement, *supra*, makes clear, the Board made detailed findings of fact as to the nature of the competing applicants and their particular service proposals and, after comparison of all the relevant factors, set forth the reasons why it had selected Northwest and Delta, in preference to Capitol, to provide the single new service required. See *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327; *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 351 (C.A.D.C.). The court below expressly found that "[t]he findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence" (Pet. App. 13a).

The Court of Appeals correctly ruled that the Board was not required to make additional findings with respect to the qualifications and proposals of the unsuccessful applicants, once it had properly determined, on a comparative basis, that their applications were to be denied. See *Continental Southern Lines* v. *Civil*

[4] The Civil Aeronautics Act of 1938, applicable to this case, has been repealed and replaced, without relevant change, by the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*

Aeronautics Board, 197 F. 2d 397, 402-403 (C.A.D.C.), certiorari denied, 344 U.S. 831; *North American Airlines* v. *Civil Aeronautics Board*, 241 F. 2d 445, 448 (C.A.D.C.). The cases upon which petitioner relies, *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, and *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 231 F. 2d 517, 521-522 (C.A.D.C.), are not in point. Both dealt with the requirement that an agency make adequate findings on all relevant issues to support its rejection of an application (or other requested relief); they do not suggest that ultimate findings as to the individual qualifications and proposals of competing applicants are required, in addition to the comparative ones upon which the agency choice necessarily turns.

2. There is no merit to petitioner's contention that it was deprived of a fair hearing because various Congressmen supported Northwest. Section 401(*c*) of the Civil Aeronautics Act expressly states: "Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate." And, in accordance with this provision, Rule 14 of the Board's Rules of Practice, 14 C.F.R. 302.14, has long provided that "* * * a representative of any department, agency or branch of the Federal government or of any state government * * * may appear and present oral argument in any proceeding in which argument has been assigned." The policy is one of allowing full expression on the public record of conflicting points of view and full opportunity to air arguments. Quite obviously, this is the very antithesis of covert procedure; there is no analogy to the problems presented in such cases as

Sangamon Valley Television Corp. v. *United States*, 358 U.S. 49; *WIRL Television Corp.* v. *United States*, 358 U.S. 51; *WORZ, Inc.* v. *Federal Communications Commission*, 358 U.S. 55; *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55, 66-67 (C.A.D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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